IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**CR00-S-422-S Superceding**
	)	
ERIC ROBERT RUDOLPH,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO RECONSIDER TRIAL DATE

COMES NOW defendant, Eric Robert Rudolph, by and through counsel, and moves this court to reconsider its decision to set his case for trial on August 2, 2004.

I. Significant Dates

- January 29, 1998	A bomb explodes at the New Woman All Women Health Care Clinic in Birmingham, Alabama.
- November 15, 2000	Eric Rudolph is indicted.
- May 31, 2003	Mr. Rudolph is arrested.
- June 6, 2003	Orders are entered formally appointing counsel to represent Mr. Rudolph who makes his first court appearance this same date.
- June 26, 2003	A superceding indictment is returned against Mr. Rudolph. Doc. #17
- November 17, 2003	Death penalty certification hearing in Washington, D.C.
- December 11, 2003	The government files notice of intent to seek the death penalty.

- December 12, 2003	A scheduling order is issued and the trial is set for August 2, 2004
- January 30, 2004	Mr. Rudolph files a motion for change of venue.
- February 23, 2004	The government files written summaries of the expected testimony of its expert witnesses. Doc. # 124 through Doc. # 131.
- March 1, 2004	Mr. Rudolph files a motion to strike the death penalty. Doc. #141.
- March 12, 2004	Additional counsel are appointed for Mr. Rudolph. Doc. #149.
- March 31, 2004	Mr. Rudolph files a motion to dismiss notice of special findings and government's notice of intent to seek the death penalty and for other appropriate relief. Doc. #166.
- April 8, 2004	Mr. Rudolph files a motion to dismiss notice of special findings and government's notice of intent to seek the death penalty for untimely filing of death notice[1]. Doc. #179 Mr. Rudolph files, under seal, a motion for discovery of laboratory bench notes and other items related to scientific evidence the government expects to present at trial. Docs. #181 and #182.
- April 16, 2004	The hearing on the motion for change of venue is rescheduled for June 21, 2004. Doc. #193.
- April 26, 2004	The government files its response to Mr. Rudolph's various motions challenging the constitutionality and imposition of the death penalty.

[1] "[D]istrict court orders denying motions to strike Death Notices as untimely filed are immediately appealable under *Cohen* [v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949)] and *Abney v. United States*, 431 U.S. 651, 52 L. Ed. 2d 651, 97 S. Ct. 2034 (1977) (Burger, C.J.), as they fully satisfy the three requirements for interlocutory appeal set forth by the Supreme Court. *United States v. Ferebe*, 332 F.3d 722, 726 (U.S. App., 2003)

- April 29, 2004	The Court sets the hearing on Mr. Rudolph's bench note discovery motion for May 18, 2004.
- May 5, 2004	The Court sets a hearing on the government's motion to quash subpoena for May 13, 2004.

II. The Reasons Why It Is Impossible to Provide Effective Counsel by August 2, 2004.

There are no circumstances under which counsel can provide Mr. Rudolph with the effective assistance of counsel required by the Constitution of the United States and start a trial in which Mr. Rudolph's life hangs in the balance on August 2, 2004.

A. The Nature of this Particular Case

Even without the death penalty, this case has been and will continue to be a daunting one for counsel due to the particular nature of its inception, the difficulty of locating witnesses, the number of experts required, and the vast and growing amount of information at issue in the government's case. Just in preparing for the case the government will present, counsel must prepare numerous motions on the fundamental Constitutional issues, become familiar with an extensive body of discovery materials and evidence, consult numerous experts on technical and scientific evidence, and conduct factual investigation. Coupled with that, of course, is Mr. Rudolph's right to have a defense presented which explains both how the government settled upon him as a suspect and pursued him to the exclusion of all others for five years and which presents alternative evidence which the government has ignored or overlooked or discounted. Moreover, the government has made this a death penalty case which requires extraordinary additional work be performed by counsel in preparation of a possible penalty phase.

The crime for which Mr. Rudolph has been charged in Alabama occurred on January 29, 1998. The government has had more than six years to prepare. From the discovery, it is clear

that the government used all the resources available to it during those years, including hundreds of law enforcement agents, at least four different laboratory facilities, and untold numbers of lawyers.

Considering the complexity of this case, the amount of factual investigation which must be done is staggering. At a minimum, counsel must be prepared to defend four separate bombings. While Mr. Rudolph only faces one bombing incident in Alabama, the government has charged Mr. Rudolph with three additional bombings which occurred in and around Atlanta, Georgia: the Atlanta Centennial Olympic Park on July 7, 1996 ; the Sandy Springs Professional Building in Sandy Springs, Georgia, on January 16, 1997; and The Otherside Lounge in midtown Atlanta on February 21, 1997.

Birmingham defense counsel are required to review and investigate the evidence surrounding the Atlanta bombings. Even though the government has represented that it will not inject the other bombings into the guilt/innocence phase of the Alabama case, the defense must be prepared to address and answer those charges should the government recant on its repeated assertion that it would not use any "Atlanta evidence." Other than the prosecutors' statements and the rules of evidence, there is nothing to prevent the government from attempting to prove that Mr. Rudolph committed all four bombings. It may be that some of the evidence related to the "Atlanta evidence," especially that evidence related to Olympic Park, is so pervasively known to the public that counsel will need to decide whether it would be appropriate to introduce the "Atlanta evidence" in the Birmingham case. Counsel may also determine that the strength of the evidence favors a presentation of the "Atlanta evidence" in the defense case because it further supports the weak circumstantial nature of the government's charges and because it may thereby

subject Mr. Rudolph to a single, rather than multiple, trials. Furthermore, the defense must anticipate that the government will attempt to prove that Mr. Rudolph committed all four bombings at the penalty phase of the trial.

While investigators appointed by this Court will assist counsel with the location and preliminary interview of possible witnesses, the ultimate responsibility rests on the lawyers to direct this process, to talk with each witness with the potential to hurt or help, and to exercise strategic judgment about which witnesses to call for trial. The amount of time this will take is staggering and is substantially more than can be achieved between now and August 2, 2004. The government took years to put this case together, it is not unreasonable to permit counsel additional time to prepare.

Defense counsel must also gain an understanding of the technical evidence the government intends to presented against Mr. Rudolph. This requires enough of an understanding of the evidence to identify and retain experts, undertake evaluation and re-testing of the evidence, and prepare challenges to the government's evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

B. The Requirements of a Capital Case

The defense acknowledges that this Court has been most generous in protecting Mr. Rudolph's right to the effective assistance of counsel. This Court has appointed five counsel to represent Mr. Rudolph, two assistant counsel, and a team of professionals including experts and investigators to assist counsel. Considering the magnitude of this case, the investigation required, and the tremendous amount of discovery involved, these appointments are clearly justified as reasonable and necessary and they begin to redress the imbalance of forces created by

the government assigning a virtual army of government lawyers and investigators against Mr. Rudolph. See, *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). Counsel have been diligently preparing for trial. However, preparing for the mitigation phase of the trial will require at least as much, if not more time as the preparation of the innocence phase.

The government is seeking to kill Mr. Rudolph. Our investigation must be adequate and thorough. In any criminal case, defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Strategic choices must be made only after thorough investigation of law and facts relevant to plausible options. Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2535 (2003). "An attorney has a duty to investigate 'the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.' A.B.A. Standards for Criminal Justice 4-4.1 (3d ed. 1993)." Fortenberry v. Haley, 297 F.3d 1213, 1225 (11th 2002). This is especially true in a "death case" where our federal Constitution demands a "heightened need for reliability" in the death penalty process. Woodson v. North Carolina, 428 U.S. 280, 305; 96 S. Ct. 2978; 49 L. Ed. 2d 944 (1976). The defense team must be afforded a reasonable time in which to investigate, explore, and prepare in order that Mr. Rudolph's innocence may be established and the flaws in the government's case may be exposed.

In addition to the "factual" portion of the defense, the defense also requires time for legal research and legal investigation into the laws involved in this case. Even in this age where computer-accessible databases promise to facilitate research and learning, legal research still remains a laborious and time-consuming task, particularly in a case where complex issues are posed.

Appointed counsel have been diligent in attempting to fulfill their responsibilities as outlined in the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (1989, amended 2003), standards which the United States Supreme Court "long ... [has] referred as 'guides to determining what is reasonable.'" Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 2537 (U.S. 2003). These Guidelines upgrade the minimum standard from "quality" legal representation to "high quality" legal representation. See, *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913, 939 (2003) (outlining the 2003 revisions to the Guidelines). Included in the guidelines is the requirement that the capital defendant should "receive the assistance of all expert, investigative, and other ancillary professional services . . . appropriate . . . at all stages of the proceedings." *Id.* at 952. Appointed counsel have made and are making conscientious endeavors to fulfill their responsibilities and to avoid unnecessary and nonessential duplication of effort.

The average time between indictment and trial in federal capital cases is 16 months. The average time between notice of intent to seek the death penalty and trial is approximately 10 months. See the Declaration of Kevin McNally, United States v. Lawrence Skiba, (W.D. PA CR No. 01-CR-291-ALL) located at http://www.capdefnet.org/pdf_library/81482.pdf. If the trial is held on August 2, 2004, less that 14 months will have elapsed between the time of the superceding indictment (June 26, 2003) and trial; less than eight months will have elapsed since the government filed notice of its intent to seek the death penalty (December 11, 2003)[2]. Finally,

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[2] In t he case of USA v. Timothy McVeigh, the time from indictment to trial was 19.75 months. The time from notice to trial was 17.5 months. For the McVeigh case and other (continued...)

this is nothing "average" about Mr. Rudolph's case.

C. Defense Counsel must have the time necessary to develop their client's life history.

Capital cases are fundamentally different than any other criminal case, not only in the severity of the potential penalty but in the nature of the evidence and information which must be developed. Sensitive facts need to be disclosed to members of the defense team who are essentially strangers to the defendant. This takes months. Then evaluation by relevant experts must follow. It is an incrementally slow process.

> "[R]ecently, in *Wiggins v. Smith*, [539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (1993)] the Court declared that counsel's failure to fully investigate Wiggins' background and present mitigating evidence of his fortunate 'excruciating life history' violated his Sixth Amendment right to counsel. The Court, citing *Williams* [*v. Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000)] and its language on prevailing norms for thorough penalty phase investigation, including those reflected in ABA standards and guidelines, found that counsel's actions could not be construed as strategic as counsel had failed to conduct a thorough social history investigation. The actions of counsel could not, according to the Court, be deemed reasonable as facts known to counsel at the time would have led "a reasonable attorney to investigate further.'
>
> "These decisions clarify the responsibilities of counsel in a capital case, particularly as it relates to preparation for and presentation in the penalty phase. In addition to the usual requirements for trying a difficult homicide case, counsel in a capital case is required, pursuant to the revised Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, to thoroughly investigate the background and circumstances of the client in order to prepare a case for the penalty phase. Given the severity and irrevocability of a death sentence, extraordinary obligations are properly placed on counsel to prepare and try such a case."

J. Miller, *The Defense Team in Capital Cases*, 31 Hofstra L. Rev. 1117, 1119-1120 (2003).

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[2](...continued)
federal capital cases involving substantial preparation time see, http://www.capdefnet.org/pdf_library/81481.pdf.

Without adequate time to develop the relationship of trust required for effective representation in a capital case, counsel may never learn or be able to present to a sentencing jury (if necessary) the most crucial facts about the defendant, facts without which any possible understanding of his actions is impossible. Developing the social history is well underway at this stage in the investigation and has focused on collecting reliable, objective documentation about Mr. Rudolph and his family. The remainder of the mitigation investigation will require several thousand hours[3]. Given the current trial date, counsel do not have the necessary time to elicit this critical data, let alone investigate, obtain records and produce witnesses.

D. The Delay in Discovery

The defense investigation began slowly for several reasons. The government, both in Birmingham and in Atlanta, has produced information in a continuing or "rolling" fashion. The result being that from June 6, 2003, through February 27, 2004[4], the prosecutions in both Birmingham and Atlanta have produced a total of 499,213 pages of discovery contained on 106 computer disks and almost 2000 video and audio cassette tapes. The first two computer disks were not Bates-stamped. Although the contents of those two disks were subsequently reproduced, the subsequent Bates-stamped production was not consistent with the first two discs,

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[3] Should this Court deem it necessary, the defense is prepared to present, under seal, the affidavit of its mitigating specialist documenting the status of the mitigation investigation performed to day and the specific tasks and number of hours necessary for a reliable investigation of mitigation. It is the opinion of this expert that a competent and reliable investigation of mitigation evidence to present at the penalty phase in Mr. Rudolph's case can not be completed by the currently scheduled trial date of August 2, 2004.

[4] The individual dates of production have been June 6 and 12, 2003; August 18, 2003; November 3, 2003; December 1 and 29, 2003; January 30, 2004; and February 17, 20, and 27, 2004.

the result being that the initial 15,240 documents contained on the first two disks had to be reread. While important documents and information have been produced through out the production process, the most significant documents and information has been produced during the latter stages of the process. In fact, of the 106 computer disks produced, 75 have been produced since the last part of December 2003. Of the audio and video cassette tapes produced, 1932 have been provided since the latter portion of December 2003.

The government has provided the defense with a tremendous amount of material to review. A significant portion of the documents produced have been produced in duplicate but under different Bates numbers. That material must be reviewed even if a significant portion of the material turns out to be utterly useless and/or duplicative, and there is no way to tell without such review. For example, most of the 302's on the first CD concern alleged and uncorroborated "sightings"of Mr. Rudolph during his alleged flight following the Birmingham bombing[5]. Even if there is significant duplication, every file and document produced must be examined in order to determine whether or not any duplication is present. The determination of what is and what is not significant is a time consuming task in and of itself.

Again, the defense will not know what additional documents to request until it knows what the government has produced. Like a jigsaw puzzle, one usually does not realize a piece is missing until the remaining pieces have been assembled. The defense cannot make any judgments on the evidence produced or not produced until the government has produced what evidence it will. An objection cannot be filed until the basis for the objection is known.

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[5] These uncorroborated sightings of Mr. Rudolph ranged throughout the continental United States and even in Hawaii. The time and geographical location of a number of the sightings render them impossible but others may need to be investigated.

On May 10, 2004, in response to a defense request for laboratory materials, the government indicated that there exist additional documents which will be provided to defense. *See* Doc. #211 (under seal). The defense welcomes this additional information and appreciates the government's production of material to which the defense is entitled. Unfortunately, until the defense actually has the promised information and documents, our ability to move forward is hampered.

E. Organization of the production

In order to access the enormous amount of electronic data produced, the defense has had to create a searchable database. The creation and organization of that database have required the "coding" of each document and have been extremely time consuming . The Birmingham material was finished only within this past month. The Atlanta production is in the process of being organized and coded. However, the time spent on the front end of this organizational process is absolutely essential in guaranteeing the ability of the defense to locate, retrieve, and tract specific documents, witnesses, and items of physical evidence.

F. Difficulty in tracking specific items of evidence

Items of physical evidence were examined by either the FBI laboratory or the ATF laboratory or both. The FBI and the ATF do not use the same identification system for marking evidence. To complicate tracking, when an item of evidence is received by a laboratory, it is assigned a new number. The defense has experienced much difficulty in tracing individual items of evidence through the laboratory analysis. The government has acknowledged that it is facing similar tracking problems.

In recognition of this difficulty, Atlanta has compiled nine volumes of "evidence chains

of custody" binders. Those binders were delivered to the defense on May 11, 2004[6]. Birmingham is in the process of preparing a similar index which is expected to be completed within the next two weeks.

F. The defense experts are stymied and frustrated by the lack of information

Initially, the defense had difficulty locating experts qualified in the subjects of explosives and trace evidence. Now that experts have been retained, they do not have sufficient information to test the validity of the government's conclusions without the bench notes and related laboratory materials which are the subject of a separate motion.

Laboratory technicians create benchnotes, which thoroughly track the collection, testing, and handling of the evidence as a matter of standard documentary practice. These notes include a contemporaneous running log of specific activities undertaken by the technician. In addition, benchnotes often contain the technician's preliminary notes and findings and a detailed description of the actual protocols followed. The amount of detail provided in the notes vary amongst the labs, but the information contained within them is usually far greater than the final lab report. They are the standard practice in laboratories because they permit a supervisor or second reader of the results to confirm the results. Without the bench notes, it is not possible to detect errors or abnormalities which might effect the results. A careful review of the benchnotes is an essential prerequisite to an adequate and independent review of the government's forensic evidence.

The laboratory evidence in this case will likely be the government's most important

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[6] The defense first access to these binders was during the physical evidence review conducted in at a government warehouse located in Virginia on May 6th and 7th, 2004.

evidence through which they will attempt to establish through circumstantial evidence that Mr. Rudolph was in contact with dynamite. Contrary to media reports, **Mr. Rudolph was never observed by anyone at the scene of any crime**. The technical determination of whether this alleged connection actually exists requires the precise collection, handling, and testing of microscopic trace evidence. Testing conducted under conditions other than pristine may likely result in contamination and tainted results. The bench notes provide the sole means for assessing this real possibility.

At a status conference on February 25, 2004, the government acknowledged receipt of Mr. Rudolph's written request of January 9, 2004 seeking benchnotes and other essential items. The government indicated that the letter "precipitated a call... to the Atlanta ATF lab to get everything they had so that we could get that to you." (Transcript of Status Conference of February 25, 2004 at p. 12). The government indicated that the discovery produced to the defense on February 20, 2004 "was stuff that had been at the ATF lab, and it was just delivered to us...around Christmas", and that this discovery "included...printouts from the machines, the mass spectrometer results, the EGIS results, the actual result of the analysis which are the underpinnings of the reports." (Id. at 11, 14). The government also made clear that it had "not planned on turning over bench notes" and that "it's our position that bench notes are not discoverable." (Id. at 14, 19).

On April 8, 2004, the defense filed a motion for discovery of laboratory bench notes and other items related to scientific evidence the government expects to present at trial. Docs. #181 and #182. That motion set out the reasons why the benchnotes and other items are absolutely essential to the defense. That motion also explained why the defense has a genuine concern

about contamination and the other problems caused by conclusory laboratory reports and inadequate discovery of benchnotes and other items in this particular case.

Most recently, on May 10, 2004, the government filed a response to the defendant's discovery motion in which it agreed that: (1) " any additional existing documents from its laboratories that relate specifically to the tests and analysis of evidence in this case...will be provided to Rudolph" (Response, pp. 1-2); (2) "[t]he United States ...will...provide (curricula vitae) for...technicians who assisted in the testing" (Id. at 10); (3) "[t]he United States is preparing and will provide a chain of custody log of the items tested, as represented during the status conferences" (*Id.*); (4) "[t]o the extent that 'bench notes' exist which show the underlying results of testing and analysis of particular items of evidence relevant to the Birmingham case and/or provide the manner and means by which an opinion as to a particular item of evidence was reached..., these materials will be provided to Rudolph" (Id. at 11); (5) "to the extent that documents showing background runs of equipment for calibration and quality assurance exist beyond that which has already been provided, they will be provided to the defendant" (*Id.* at 11); (6) "to the extent that documents exist that relate too the calibration of equipment used in testing in this case exist,...such materials will be provided to the defendant" (*Id.*); (7) "[t]o the extent that documents exist that relate to the storing and routing of evidence that was tested in this case while the evidence in the laboratories, ... these materials will be provided to Rudolph" (*Id.*); (8) "[t]o the extent that documents exist that relate to monitoring for explosives traces within the lab, including monitoring of personnel and equipment, while the evidence in this case was tested and evaluated..., these materials will be provided to Rudolph" (*Id.*); (9) "[t]o the extent that ASCLD accreditation information at the time of testing and analysis of evidence by the BATFE

laboratories in the present case is available it will be provided to the defendant" (*Id.* at 14); and, (10) "[l]aboratory protocols outlining practices and procedures followed in the testing and analysis of evidence submitted to the BATFE laboratory pertinent to the Birmingham case will be disclosed...as they relate to testing, examination and analysis of evidence" (*Id.*) .

Although the defense appreciates the government's concessions, it is clear that in view of the number of items tested in this case and the scope of the government's agreement to produce items in the ten categories noted above, it is anticipated that the government will require a substantial amount of time to actually produce the promised discovery. Significantly, no time table is set forth in the government's response. However, even if the government moves with all deliberate speed to produce the discovery, it is physically impossible for the defense, in the time remaining before trial, to organize the expected massive quantity of discovery, get the material to defense experts, consult with the experts as to the meaning of the documents and the need for retesting, conduct any retesting, and then produce and litigate any motions to exclude the government's forensic evidence.

Without the benchnotes and other items requested in the discovery motion, the defense is unable to move forward on its examination of the government's expert testimony and its preparation of appropriate pretrial motions challenging the admissibility of the government's forensic evidence.

III. Governing legal principles

This Court is well aware of the legal principles which govern the question presented by this request for continuance. The Sixth Amendment guarantees criminal defendants the effective assistance of counsel. It is not an accident that the Supreme Court has often addressed

the issue of the effectiveness of counsel in the context of capital cases. *See Strickland v. Washington*, 466 U.S. 688 (1984).

To render effective assistance of counsel, there must be adequate time to prepare for a case. *See Powell v Alabama*, 287 U.S. 45 (1932). The duty to appoint counsel "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the *preparation* and trial of the case." *Id.* While "the Constitution nowhere specifies any period which must intervene between the required appointment of counsel and trial, the denial of opportunity for appointed counsel to confer, to consult with the accused and to *prepare* his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." *Avery v Alabama*, 308 U.S. 444, 446 (1940). Obtaining adequate time to properly prepare for representing a person facing death is essential. In this case, the necessary investigation, motion advocacy and preparation cannot be accomplished without additional time.

Defense counsel face difficult and time-consuming tasks in capital cases, especially in light of the fact that they operate without the resources available to the government. Since a person's life is at stake, counsel are required to exhaustively explore every factual and legal aspect of the "defendant's character...and any of the circumstances of the offense..." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), preparing in effect for two trials. A capital trial is different from all other cases, not just by degree, but by kind. In *Ungar v. Sarafite*, 378 U.S. 575, 84 S. Ct. 841, 11 L. Ed. 2d 921 (1964). the Supreme Court explained:

> "The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without

> counsel. *Avery v. Alabama*, 308 U.S. 444. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. *Chandler v. Fretag*, 348 U.S. 3. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied. *Nilva v. United States*, 352 U.S. 385; *Torres v. United States*, 270 F.2d 252 (C. A. 9th Cir.); cf. *United States v. Arlen*, 252 F.2d 491 (C. A. 2d Cir.)."

Sarafite, 378 U.S. 598-90, 84 S. Ct. 858-59.

Denial of a motion for continuance raises constitutional concerns "if there is an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." *United States v. Gallo*, 763 F.2d 1504, 1523 (6th Cir. 1985) (citation omitted), *cert. denied*, 474 U.S. 1068 (1986). *See, e.g., United States v. King*, 664 F.2d 1171, 1173 (10th Cir. 1981); *United States v. Verderame*, 51 F.3d 249 (11th Cir.1995); *see also United States v. Poston*, 902 F.2d 90, 96 (D.C. Cir. 1990) ("denial of a continuance to allow new counsel to prepare implicates the sixth amendment right to counsel."). The granting of a continuance and affording reasonable time for preparation is "of special importance where the accused is represented by appointed counsel" in a capital case. *Fugate v. Commonwealth*, 72 S.W. 2d 47, 48 (Ky. 1934).

IV. Conclusion

The fundamental concern that drives this request for a resetting of the trial date is the need to provide Mr. Rudolph with the degree of legal representation to which he is entitled under our system of law. That concern is grounded on the proposition that Mr. Rudolph be provide a fair and just trial. That can only occur if the present trial date is rescheduled and the defense is given a reasonable and adequate time in which to prepare.

It is requested that should this Court have any doubt about the necessity of granting this motion, a closed ex parte hearing be conducted in which the defense is allowed to set forth, in greater detail than that provided herein, further factual basis for this request[7].

Dated: May 13, 2004

Respectfully Submitted,

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[7] "While open criminal proceedings give assurances of fairness to both the public and the accused, there are some limited circumstances in which the right of the accused to a fair trial might be undermined by publicity." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9; 106 S. Ct. 2735, 92 L. Ed. 2d 1 (U.S., 1986),

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of May 2004, a copy of the foregoing has been served upon the following by facsimile and by placing a copy of same in the U.S. Mail first class postage prepaid and addressed as follows:

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